Family Law – Same but Different

Greg Shoebridge, Simone Fraser and The Hon. Justice Michael Jarrett.

Delivered at the Bar Association of Queensland Annual Conference on 4 March 2023

Introduction

The family law jurisdiction can provide counsel with plenty of opportunity to appear in trials and interim hearings. Counsel often get the opportunity to develop their cross-examination technique and other advocacy skills at a rapid rate. However, when counsel who do not regularly appear in the family law jurisdiction are asked to do so, they often balk.

Although much of the decision-making undertaken pursuant to the *Family Law Act 1975* (Cth) is discretionary and to many a form of voodoo or black magic, this paper is an attempt to convince you that whilst there are some points of difference, there are many similarities between the family law jurisdiction and other jurisdictions. Indeed, from a barrister's point of view, the courts exercising jurisdiction under the Act should be seen as nothing more than another place where counsel can practise their specialty – advocacy.

We immediately accept that in an area dominated by discretionary decision making, counsel unfamiliar with the practice and procedure of the courts exercising jurisdiction under the Act might feel a little intimidated. We hope what we have to say goes some little way towards you understanding that the approach adopted to decision making under the Family Law Act is, as a matter of general principle and approach, no different to discretionary decision making in other areas of the law such as the granting of discretionary statutory relief (say under the *Corporations Act 2001* (Cth) or the *Bankruptcy Act 1966* (Cth)), equitable relief, or the sentencing of criminal offenders. We hope to, in some small measure, "de-mystify" some aspects of family law decision-making and encourage those who do not regularly appear in the jurisdiction to consider how doing so might help them to grow as advocates.

Additionally, it is hoped that this paper might offer a few salient reminders to those who do regularly appear in the jurisdiction.

The courts

First, a word about the federal courts exercising jurisdiction under the Family Law Act.

It is often said that upon the commencement of the *Federal Circuit and Family Court of Australia Act 2021* ("FCFCoA Act") on 1 September, 2021, the Federal Circuit Court of Australia and the Family Court of Australia were "merged" to create the Federal Circuit and Family Court of Australia. However, neither of those two Courts were in fact disbanded and each is expressly continued in existence by the FCFCoA Act. In this respect, the only work done by the FCFCoA Act is to rename each of the two courts in a deceptively similar way. The Federal Circuit Court of Australia is now known as the Federal Circuit and Family Court of Australia (Division 2) and the Family Court of Australia is now known as the Federal Circuit and Family Court of Australia (Division 1). Each remains a court separate from the other and each has its own cohort of judges who are appointed with very different terms and conditions. Exceptionally, the Chief Justice and Deputy Chief Justice of the Federal Circuit and Family

Court of Australia (Division 1) are also the Chief Judge and Deputy Chief Judge (Family Law) of the Federal Circuit and Family Court of Australia (Division 2) respectively.

Each court has authority to make orders under the Family Law Act, although generally speaking proceedings can only be instituted in the Federal Circuit and Family Court of Australia (Division 2).

For the purposes of ensuring the efficient resolution of family law or child support proceedings, the Chief Justice of the FCFCoA (Div1) must work cooperatively with the Chief Judge of the FCFCoA (Div2) with the aim of ensuring common approaches to case management. Common rules of practice and procedure have been formulated and promulgated by the Chief Justice and Chief Judge that apply to the family law and child support work conducted in each court: see the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* and the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021*. Additionally, each court has issued a number of practice directions bearing upon day-to-day practice and procedure, the most significant of which is perhaps the *Central Practice Direction – Family Law Case Management*.

It goes without saying that you should have a working knowledge of the relevant rules and practice directions.

The work of the Courts and the focus of this paper

You will probably be aware that there are four main areas of decision making that arise under the Family Law Act, namely: divorce, parenting, property adjustment and spousal maintenance. Both courts have jurisdiction and power to make a range of other decrees, declarations and orders concerning various other subjects, for example declarations of nullity, paternity, leave to commence adoption proceedings and of course orders under the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth).

In this paper we have focussed upon the discretionary nature of decision-making under the Family Law Act, particularly by reference to property adjustment cases. But that is not to say that anything we say below is confined to such cases. We have attempted to highlight matters of general principle and approach that apply to discretionary decision-making across all areas of work under the Family Law and Child Support Acts.

A word about evidence

Contrary to some anecdotal beliefs, as a general proposition, the rules of evidence prescribed by the *Evidence Act* 1995 (Cth) apply in family law cases. The exception to this general proposition is found in s 69ZT of the Family Law Act. It is as well to set out the relevant parts of the legislation because in our experience, its terms are not well understood:

> **69ZT Rules of evidence not to apply unless court decides**
>
> (1) These provisions of the Evidence Act 1995 do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying because of subsection (1).

(3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:

(a) the court is satisfied that the circumstances are exceptional; and

(b) the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

(4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court

> may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

It can be seen that in all areas of the courts' work, the rules of evidence apply, except child related proceedings and the rules or some of them may be applied if the court decides to do so. Interestingly, in cases where there are allegations of conduct that amounts to serious criminal conduct, rarely is an application made that the rules of evidence should apply. Having regard to what was said in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 by Dixon J that "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences, it is a little surprising that such applications are not more common. *Briginshaw,* of course, was a matrimonial case.

Whilst consideration and discretion are called for (because you don't want to get a judge off-side by making needless and tiresome objections to evidence), proper application of the rules of evidence will deliver significant forensic advantages in cases in these courts.

Your knowledge of other areas of law

You can bring your knowledge of other areas of law to the family courts at 119 North Quay. You don't need to leave that knowledge outside. It will be useful inside the court.

No special law applies to the determination of property ownership under the Family Law Act. Indeed, so much was underscored by the High Court in *Stanford v Stanford* (2012) 247 CLR 108. That decision pointed out that before a court could embark upon making a property adjustment order, it needed to determine what property the parties to the proceedings owned and identify the nature of their respective interests in that property. Only after that is done can the court determine whether it is just and equitable to make any order adjusting the parties' interests in the property so identified and how those interests might by adjusted to give a just and equitable outcome.

In many property adjustment applications the parties to the dispute have interests in corporate entities or partnerships. They may be beneficiaries, trustees or appointors of trusts. It is not uncommon for there to be allegations that property is held by a party on trust for a stranger to the litigation or by a stranger to the litigation for a party. The courts have specific power under s 78 of the Family Law Act to make declarations in relation to interests in property and may make orders that operate *in rem* against property situated in Australia.

By virtue of the accrued jurisdiction of the FCFCoA, discussed in more detail below, the Court often has the jurisdiction to deal with the entirety of a dispute, including the part of the dispute that relates to the type of interests referred to above.

To determine the parties' interest in the various property at issue, the law to be applied is the same general law that would apply in other jurisdictions to determine that issue. To assist it to determine those matters, it is not uncommon for either court to direct parties to produce pleadings, statements of facts, issues and contentions, or to otherwise particularise the relief claimed in a manner similar to that followed in other general law jurisdictions.

Additionally, the Federal Circuit and Family Court of Australia (Division 1) has original jurisdiction under the *Corporations Act 2001* (Cth) and both courts have original jurisdiction

under the *Bankruptcy Act 1966* (Cth). A working knowledge of those Acts can prove invaluable in the family law jurisdiction.

Third parties may be joined to or intervene in family law proceedings. Often their involvement revolves around suggestions that assets are held on trust but there can also be claims in relation to debts or enforcement of other obligations.

So, what are the differences in practice compared to other courts?

Unlike courts determining common law claims for example, almost every decision made under the Family Law Act is a discretionary judgment. Thus, whether orders involving children, property adjustment between spouses (*de facto* and *de jure*) or child support orders should be made at all, and the terms of any orders to be made, are entirely discretionary. There are exceptions, the most important perhaps being decrees of paternity, divorce, nullity or invalidity which are rarely withheld on discretionary grounds.

Even in relation to parenting matters, which technically involves an inquiry into the best interests of children, there is extensive exercise of discretion in relation to several of the elements that the Court must necessarily make rulings on in relation to that inquiry.

Discretionary decision-making

This paper is not intended to be a treatise on discretionary decision-making, but some understanding of the relevant principles in the present context is necessary.

Obviously discretionary decision-making is not unique to family law. The approach to the exercise of a broad unfettered discretion is well-settled. A court is required to identify the relevant factors and weigh them one against the other to arrive at a determination about the discretion to be exercised. Taking into account extraneous or irrelevant matters, mistaking the facts or acting on a wrong principle may lead to appellate interference with the decision. But absent any one of those things, providing the determination falls within the ambit of reasonable and plainly not unjust outcome, a judge's discretionary judgment will withstand appellate scrutiny: *House v The King* (1936) 55 CLR 499 at 504-505.

The approach to the exercise of the various discretionary judgments that might be made under the Family Law Act is no different. The courts identify the relevant matters or factors that bear on the decision to be made, consider the evidence about those matters, making findings about the facts where necessary, and then weigh the various matters against each other to derive an outcome.

However, it is important to recognise that the discretions that might be exercised when making orders about parenting, property adjustment or spousal maintenance, for example, are broad but not unfettered. Thus, when making a parenting order, a court must regard the best interests of the child as the paramount consideration: s 60CA of the Family Law Act. In property adjustment cases, notwithstanding that s 79(1) of the Act confers a discretion to make "such order as it considers appropriate" a property adjustment order can only be made where it is just and equitable to do so: s 79(2) of the Family Law Act and *Stanford v Stanford* (2012) 247 CLR 108. In a spousal maintenance application, any order that is made must be proper for the provision of maintenance in accordance with Part VIII of the Act: s 74(1) of the Family Law Act.

These qualifications upon the exercise of these general discretions to make orders are themselves very broad. The approach to them and the effect upon an exercise of the underlying discretion is, in our view, explained in *Norbis & Norbis* (1986) 161 CLR 513. In this case Mason and Deane JJ referred to the classic statement about discretion from *House & The King* [1936] 55 CLR 499 at 504 – 505 and went on to say:

> *Here the order is discretionary because it depends on the application of a very general standard – what is "just and equitable" – which calls for an overall assessment in the light of the factors mentioned in s. 79(4), each of which in turns calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.*

Guidance for the exercise of these broad discretions comes from two sources. The first is the Act itself. The Act sets out the matters that must be taken into account when determining what order to make: in parenting cases – those matters set out in ss 60CC(2) and 60CC(3); in property adjustment cases – those set out in ss 79(4)(a) – 79(4)(e); and in spousal maintenance cases – those matters set out in s 75(2) of the Act. Thus, rather than guessing at what might be relevant in any particular case, the Act offers guidance, which if followed, will ensure that relevant matters are identified and "extraneous considerations" jettisoned.

The second source of guidance is appellate decisions that establish guidelines for the exercise of a particular discretion. However, the law about this is not so settled.

In *Norbis* at 519, Mason and Deane JJ identified that the fact that a judicial discretion is framed in general terms does not mean that Parliament intended a court (the Full Court of the Family Court of Australia in that case) to "refrain from developing rules or guidelines" that might be relevant to the exercise of that discretion. Their Honours recorded that appellate courts are entitled to give guidance, though that guidance should fall short of a binding rule which if ignored might be grounds for a finding that the particular direction has miscarried. Their Honours noted that, whilst on the one hand a broad discretion maximises the possibility of doing justice in every case, on the other there is a need for consistency in judicial adjudication to avoid arbitrary and capricious decision making.

Other members of the High Court in *Norbis* expressed their opinions in a slightly different fashion. Wilson and Dawson JJ initially drew from the classic statement of Gibbs CJ in *Mallet v Mallet* (1984) 156 CLR 605 at 608-609. In *Mallet,* Gibbs CJ said that prior decisions can *"do no more than provide a guide"*.

Specifically, Wilson and Dawson JJ said at 533-534:

> *We think it is not possible to take the question of guidelines further than this. Nor is it desirable to attempt to do so. With all respect to those who think differently we believe that the sound development of the law, in this area as in others, is served best by following the tradition of the common law. The genius of the common law is to be found in its case-by-case approach. The decision and reasoning of one case contributes its wisdom to the accumulated wisdom of past cases.*

> *The authoritative guidance available to aid in the resolution of the next case lies in that accumulated wisdom. It does not lie in the abstract formulation of principles or guidelines designed to constrain judicial discretion within a predetermined framework. There is no reason to think that the traditional approach, when applied in the family law area, leads to arbitrary and capricious decision making or that it leads to longer and more complex trials.*

Brennan J found that there could be legitimate guidelines provided by an appellate court, however he did not agree that the court could elevate any legitimate guidelines to any binding rule of law that would absolutely fetter the exercise of discretion. At 536 Brennan J said as follows:

> *The authority of an appellate court to give guidance is not to be doubted. It is inevitable that the wisdom gained in continually supervising the exercise of a statutory discretion will find expression in judicial guidelines. That is not to invest an appellate court with legislative power but rather to acknowledge that, in the way of the common law, a principal which can be seen to be common to a particular class of case will ultimately find judicial expression. The orderly administration of justice requires that decisions should be consistent with one another and decision making should not be open to the reproach that it is adventitious. These considerations are of a special importance in the administration of the law relating to custody of children, maintenance and property arrangements on the dissolution of marriage. The anguish and emotion generated by litigation of this kind are exacerbated by orders which are made without the sanction of known principals in which are seen to be framed according to the idiosyncratic notions of an individual judge. An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process.*

It is interesting to look back on the comments made by the members of the High Court so soon after the introduction of the *Family Law Act*. It is interesting, because some of the nuanced comments about the extent to which guidelines can be provided by appellate courts, still give rise to debate in more recent times. In 2001 the High Court referred to *Norbis* in *Wong v The Queen* (2001) 207 CLR 584. *Wong* concerned the use of guideline tables in sentencing criminal offenders. Speaking of the decision in *Norbis,* the plurality, Gaudron, Gummow and Hayne JJ, said at [79]-[80] (citations omitted):

> *It is convenient, at this point, to return to the question of jurisdiction and power to issue prescriptive guideline tables of sentences. Those who supported the continuation of the practice of publishing guideline tables of sentences placed chief reliance upon this Court's decision in Norbis v Norbis where a majority of the Court held that the Full Court of the Family Court of Australia could properly give guidance "in the form of guidelines rather than binding principles of law" about how the discretion given by s 79 of the Family Law Act 1975 (Cth) should ordinarily be exercised. What the Full Court had done was to say that in deciding what division of property between parties to a marriage was just and equitable, having regard to each party's contribution to those assets, it is ordinarily more convenient to consider the assets globally rather than one by one. Importantly, the three Justices who constituted the majority in Norbis did not agree on what consequence would follow if a trial judge did not observe a guideline*

of the kind that had been adopted. Two members of the majority, Mason and Deane JJ, were of the opinion that an appellate court which gives guidance as to the manner in which a statutory discretion should be exercised may prescribe that such guidance should have the force of a binding legal rule. The third member of the majority, Brennan J, disagreed.

This difference of opinion in Norbis identifies the central difficulty about a guideline judgment which purports to identify a particular range of results that should be reached in future cases, rather than the considerations which a judge should take into account in arriving at those results. If a table that is published is intended to found arguments in future cases that the discretion exercised in that future case miscarried, whatever may be the caveats that might be entered at the time of promulgating the table, it becomes, in fact, a rule of binding effect. Departure from it must be justified. Or as the Court of Criminal Appeal said here, departure will "attract … close scrutiny". The fixing of such a table begins to show signs of passing from being a decision settling a question which is raised by the matter, to a decision creating a new charter by reference to which further questions are to be decided. It at least begins to pass from the judicial to the legislative. If, by contrast, the table is not intended to have that effect, what is its purpose? Is it intended as no more than some warning about how the Court of Appeal might act in future cases? If it represents a departure from hitherto accepted levels of sentence, is it intended to have the effect of prospectively overruling past decisions of either the Court of Appeal or trial judges?

The plurality in *Wong* concluded that the publication of expected or intended results of future cases was not within the jurisdiction or the power of the New South Wales Court of Criminal Appeal. They held that the formulation of judicial guidelines could not be prescriptive upon future decision-making but permitted the possibility that such a table could be used as something of a "sounding board" or check against the exercise of discretion. They said that the actual sentences imposed in prior cases did not give rise to binding precedent. They did say that what might give rise to a precedent is a statement of principles that affect how the sentencing discretion should be exercised either generally or in a particular kind of case. Kirby J reached a very similar conclusion for very similar reasons. This reasoning aligns neatly with Brennan J's reasoning in *Norbis.*

Subsequently in *R v Pham* (2015) 256 CLR 550, the High Court held that lower courts must have regard to appellate judicial guidelines *"unless there is a compelling reason not to do so"* (at 560 [29]).

What does all this mean in the context of our present discussion? Well, it means that the Full Court of the Federal Circuit and Family Court of Australia (Division 1) (and its predecessor) can establish guidelines that trial judges should generally apply when exercising the discretions set out in the Family Law Act.

Is it a guideline or an actual rule?

Unlike the Pirate Code which should be seen "more as guidelines than actual rules" (see *Jobson v Clarke* [2021] QDC 320), it is sometimes difficult to tell whether what has fallen from the Full Court should be treated as a guideline, the transgression of which will not lead to appellate interference, or a rule, disobedience to which will have the opposite effect.

In *Re Browne v Green* (1999) 25 FamLR 482, the Full Court of the Family Court was considering a trial judge's exercise of discretion in a property adjustment case. Specifically, the Court was looking at the trial judge's *"failure"* to apply the line of reasoning from *Re Kowaliw* (1981) FLC 91-092. *Kowaliw* is often cited as authority for the suggestion that in certain circumstances a court may consider debts as being attributable solely to one party or the other rather than as something that was jointly created during the marriage. In *Re Browne v Green,* the Full Court held that the principles espoused in *Kowaliw* had, over time, become a *"well accepted guideline… the use of which assists in the achievement of the important goal of consistency within the jurisdiction"* at [44]. The Full Court determined that the trial judge had erred because although what was said in *Kowali* was a "guideline", there was no good reason for not applying it and failure to do so attracted appellate correction.

In *Hoffman v Hoffman* (2014) 51 FamLR 568, the Full Court of the Family Court was considering what was described as the concept of "special skills" or "special contributions" made by one party to a relationship and the significance of those "special skills" or "special contributions" to the overall outcome in the case. A number of decisions had been reported to that point in time where extra weight had been attributed to the contributions of one spouse or the other who had, through some sort of entrepreneurial effort, generated very high assets or income. The Full Court paid specific reference to the extent to which *"guidelines"* can impact on the exercise of judicial discretion under the *Family Law Act*. After referring to *Norbis* and *Mallet* at [41] the Full Court said:

> *What emerges, relevant to the instant discussion is, first, that there is a distinction between a "legitimate guideline" and guidance or "statements of principle" that do not fit that description. Secondly, a "legitimate guideline" requires, axiomatically, a principle which can be identified with clarity and, in addition, the identification of a "particular class of case" to which it applies. As has been seen, a legitimate guideline should either apply to* all *cases or, at least,* all *instances within an identifiable category of case."*

The finding of the Court in *Hoffman* was consistent with the notion that appellate courts can lay down *"legitimate guidelines"* which guide some aspects of the exercise of a discretion, however there is discretion in applying that guideline.

Hoffman held that the discretion to apply a guideline may miscarry if the failure to do so causes the overall exercise of discretion to miscarry. Thus a submission that there has been a failure to apply a legitimate guideline means that there is a need for close scrutiny of the ultimate exercise of discretion.

The Full Court in *Hoffman* concluded that there was in fact no principle or guideline that related to *"special contributions"*. In coming to that conclusion, the Full Court noted that there were a great many trial decisions that had in fact operated on a wrong understanding that there was some principle to that effect. Importantly for the purposes of any conversation about exercise of discretion and guidelines in a family law context, the Full Court in *Hoffman* said:

> *Contentions have been made periodically that "legitimate guidelines" exist in respect of a number of purported "categories of case". Examples might be seen to include global/asset-by-asset approach; initial contributions; gifts and inheritances; waste; and conduct making contributions significantly more arduous.*

Consideration of the decisions to which reference has just been made reveals that some *statements within those cases* may *be described as "legitimate guidelines" in the sense just discussed while many others may not.*

The essential inquiry, however, is not one of categorisation or labelling; rather the task is to assess, relevantly, whether the authorities reveal a principle enunciated with clarity and clear indicia as to a class or category of case in which the clear principle can be applied universally so as to guide the exercise of the discretion in the sense earlier outlined."

Most recently in *Trevi & Trevi* [2018] FamCAFC 173, the Full Court grappled with the distinction between a "legitimate guideline" and a binding principle of law. In the context of discussing the treatment of capital prematurely spent by one of the parties on legal fees, the Full Court said:

[31] To the considerations just discussed must be added the propositions emerging from authority that paid legal fees as a category of addback is imbued with considerations specific to that expenditure. The Full Court said in Chorn: … (passages omitted)

...

[32] Those passages can be seen as an attempt to establish "guidelines", undertaken after a detailed examination of earlier authorities, for the treatment of paid legal fees within s 79 proceedings. There can be little doubt that the statements made in that case have been applied by trial judges ever since.

[33] The word "guidelines" is used advisedly so as to distinguish the same from "binding principles of law". The distinction is important. Failure to follow a binding principle of law is an error of law. By contrast, the failure of a trial judge to follow a guideline:

> *…does not of itself amount to error, for it may appear that the case is one in which it is inappropriate to invoke the guideline or that, notwithstanding the failure to apply it, the decision is the product of sound discretionary judgment. [However] [t]he failure to apply a legitimate guideline to a situation to which it is applicable may … throw a question mark over the trial judge's decision and ease the appellant's burden of showing that it is wrong…(*Norbis & Norbis *(1986) 161 CLR 513 at 520)*

…

[39] As has been said, legitimate guidelines "guide the exercise of a discretion"; they do not replace it. Guidelines, must "[preserve], so far as it is possible to do so, the capacity … to do justice according to the needs of the individual case". The decision to addback or not addback paid legal fees remains a matter of discretion. But, a finding that it is just and equitable to not addback an amount of legal fees so paid is a finding that it is just and equitable for the other party to contribute to the costs of the first party in that proportion as part of an overall assessment of the justice and equity governing their property division.

Relevance

In a paper addressed to a broad collection of counsel, some of whom appear in the family law jurisdiction and many of whom do not, the relevance of what has been set out above is as follows:

(a) To those who appear regularly in the family law jurisdiction, it is essential to understand what the term *"exercise of discretion"* actually means. It is equally essential when assessing each case and developing the argument in relation to each part of that case, to ask yourself whether or not the case authorities that you are referring to could be seen as amounting to *"legitimate guidelines"*.

If the cases that you are looking at do amount to a legitimate guideline, argue them accordingly at the trial however do not fall into the trap of arguing them as if they are in any way prescriptive on the exercise of discretion.

(b) To those who do not appear regularly in the family law jurisdiction, whilst family law might appear to have a language all of its own with a thousand unwritten rules, the exercise of discretion contained in s 79 of the Family Law Act is expressed in very broad terms.

The elements that inform the exercise of that discretion are usually identifiable from the material itself and the case authorities that you read ought not be confused as anything more than at best, legitimate guidelines in relation of the exercise of that discretion.

In that sense, the exercise of discretion in family law proceedings is in fact very similar to the exercise of discretion in just about any other jurisdiction.

So, are there any "legitimate guidelines"?

Authority tends in favour of any statements that might look like they lay down binding rules for the exercise of the discretions that arise under the Family Law Act being legitimate guidelines only. In *Hoffman*, the Full Court said:

> *[25] It is clear that even if what might be described as the broader view of Mason and Deane JJ is preferred, the scope for a guideline to become a binding rule of law is very narrow indeed (*Norbis *at 537 per Mason and Deane JJ):*
>
> > *… guidance must be given in a way that preserves, so far as it is possible to do so, the capacity of the Family Court to do justice according to the needs of the individual case, whatever its complications may be. Reconciliation of these goals, suggests that in most, if not all, cases the Full Court of the Family Court should give guidance in the form of guidelines rather than binding principles of law …*
> >
> > *The reference to "wrong principle" in the passage quoted from House v King no doubt refers to a binding rule rather than a guideline in the sense already explained …*

When in doubt think "legitimate guideline".

Replete as it is with various discretions to be exercised, the *Family Law Act* offers up innumerable circumstances in which it is available to the Full Court to offer legitimate guidelines. It may not always be obvious when a body of case law amounts to a legitimate guideline. *Hoffman* is an example of that. Nonetheless, it is important to bear in mind the warning in *Norbis* where Brennan J said this, at 538 – 539:

> *The expression of guidelines must be undertaken cautiously, ensuring that a sense of urgency does not diminish the care necessarily to be taken in expressing guidelines in terms which will be seen to be just and equitable in the generality of cases. It is not enough to assert the predilections of particular judges as guidelines …*
>
> *The nature of the discretion is such that, if guidelines can be expressed, they will be expressed in very general terms. Detailed guidelines are unsuitable for application to circumstances which are quite diverse… Guidelines necessarily express standards and values: not legal standards and values, but standards and values derived from sources which the court thinks appropriate…*

It is not within the scope of this paper to identify every area in which "legitimate guidelines" have been suggested by the Full Court. Two examples will suffice.

"*Kennon*" arguments

In *Re Kennon* (1997) 22 FamLR 1 the Full Court held, at 24:

> *Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79.*

This, we suggest, is a "legitimate guideline". It turns something which is not, on its face, within the matters mandated for consideration in s 79(4) into something which, if supported by the evidence, is relevant and, if not taken into account, will lead to appellable error: see *Keating & Keating* [2019] FamCAFC 46; FLC 93–894.

The guideline offered by *Kennon* has been explained in *Spagnardi v Spagnardi* [2003] FamCA 905:

> *As Kennon has established, it is necessary to provide evidence to establish:*
>
> - *The incidence of domestic violence;*
> - *The effect of domestic violence; and*
> - *Evidence to enable the court to quantify the effect of that violence upon the parties [sic] capacity to "contribute" as defined by section 79(4).*

Although the accuracy of the last bullet point was doubted in *Keating & Keating*.

The legitimate guidance that can be drawn from *Kennon* and subsequent decisions such as *Polanski* (2012) 259 FLR 122 are to the effect that the relevance of violence to the assessment of contributions depends upon the nature and quality of the evidence in relation to whether or

not the violence occurred, the extent to which the violence impacted upon the ability to contribute and some measure of the way in which that effect manifested itself.

The flip side of that guidance is that in the absence of evidence addressing those elements, evidence of violence during the relationship in property proceedings may be irrelevant.

Addbacks

Anyone who has even dabbled in family law may very well have experienced the frustration of a misguided "addback" argument.

There is some scope for the Court to treat the premature and inappropriate disposal of assets prior to trial in a particular way. That may include, for example, including the asset that was disposed of on the balance sheet notwithstanding its disposal. That is to say, the court may treat the asset as if it still existed and in the hands of the party who disposed of it.

In *Watson v Ling* (2013) 49 Fam LR 303, 309, paragraphs 34-35 Murphy J said:

> *The assessment of the circumstance under discussion is, ultimately, a matter of discretion … equally, however, authority dictates that it will be "the exception rather than the rule" … that a direct dollar adjustment equivalent to the amount of the alleged dissipation of the pool is made to the otherwise entitlement of a party. It may be that aspects of the erstwhile treatment of legal fees pre-Stanford … will require further consideration in an appropriate case.*
>
> *Importantly, of course, as has been emphasised in many authorities including those cited above, not every dissipation by a party can be seen to involve an affront to justice and equity; again the circumstances of the individual relationship must be assessed.*

There is abundant case authority that creates, it is submitted, a guideline to the effect that the use of joint funds by one party to pay their legal fees in relation to the matrimonial proceedings is likely to result in an "addback": see for example, *Lovine v Connor* (2012) FLC 93-515.

However, the guidance to be derived from *Watson & Ling* and subsequent cases is to the effect that it is not axiomatic that a premature dissipation of assets by one party or the other will result in that equivalent dollar value being added back to the pool under consideration.

Common misconceptions about guidelines

There are a number of areas in which even experienced practitioners in family law tend to suggest, probably wrongly, that there are "legitimate guidelines" to be taken into account.

For example, in the area of inheritances, it is often suggested that the party inheriting the funds is to be credited as to the effect that they contributed those funds or those funds were contributed on their behalf. However, the authorities tell us that the consequence of inheritances simply has to be assessed amongst the myriad of other contributions throughout the relationship.

In relation to long marriages, the suggestion is often made that we should simply consider the conduct of the parties over the length of the marriage as having approximated each other. However, the authorities make it clear that there is no such guideline and that contributions

made by the parties ought simply be assessed on a case by case basis as part of the exercise of discretion.

Again, it is outside the scope of this paper to identify every example of practitioners arguing that the Court has provided "legitimate guidelines" when it has not.

Recent "developments"

In *Jabour & Jabour* [2019] FamCAFC 78 the Full Court of the Family Court had to consider a trial decision made in relation to a marriage of 24 years. The husband in that case had an interest in rural property. He had started acquiring that interest when he was 12 years old. Property that he had owned well before his relationship with the wife commenced was sold and the proceeds used to purchase more property. One block of land was rezoned causing a significant increase in the value of that particular block of land.

At trial the primary judge determined that aside from the contribution of the property that the husband owned prior to the relationship, contributions throughout the marriage were equal. The trial judge assessed the contribution of land by the husband at the commencement of the relationship as necessitating an adjustment and the trial judge assessed the husband's contributions at 66% and the wife's at 34%.

The wife was successful in her appeal which was primarily based on grounds to the effect of the trial judge did not give proper weight to the joint decisions by the parties in relation to the use of funds from the sale of other blocks of land and the joint decisions of the parties about whether or not to sell the land which was ultimately rezoned.

That decision is commonly held out by parties as some sort of guideline in relation to various things including that initial contributions come secondary to assessment of contributions during a relationship, that the sudden increase in value of an asset unrelated to the efforts of the parties is a joint windfall, etc.

However, within the body of the Full Court decision itself, at paragraphs 72 to 87, lies the true characterisation of that case. The decision means nothing more than that the Court must holistically assess the myriad of contributions made by the parties during their relationship. That is to say, there is no guideline of any sort to be derived from the case of *Jabour* other than that there really is an exercise of discretion to be undertaken by a trial court in family law. The Full Court assessed the husband's contributions at 53% and the wife's at 47%.

Another example of misplaced importance on a particular recent decision is the decision of *Chancellor & McCoy* [2016] FamCAFC 256. In that decision, the parties had cohabited for approximately 27 years. Both of the parties were relatively well off financially however one party was substantially better off than the other.

The trial judge found that the parties had kept their financial circumstances separate throughout their relationship. Intermingling of finances was modest in terms of both frequency and quantum.

The parties did not have joint bank accounts and did not consult each other in relation to the way in which they bought or sold property and they were responsible for their own debts.

Interestingly, one of the examples that the trial judge gave in her findings was in relation to the fact that neither party had nominated the other as a nominated beneficiary of the others estate in their will.

That decision has been, wrongly, advanced by practitioners in family law as some sort of guideline to the affect that keeping your financial circumstances apart should always result in no property adjustment.

However, again, the true importance of that particular decision lies within the reasons of the Full Court itself.

At paragraphs 45 to 55 of the Full Court Judgement, it is observed that the trial judge took into account a summary of relevant criteria and exercised her discretion in that case not to make an adjustment of property.

The use of comparable cases in property adjustment applications

It follows from what has been said above that the use of case precedent is a somewhat nuanced exercise in family law. That is not to say that the use of comparable cases in property adjustment cases is inappropriate. The authorities are in conflict on the point, but were recently explained in *Wallis & Manning* (2017) FLC 93–759.

Other areas of law that are dealt with in family law disputes

It is not the intention of this paper to comprehensively address every other area of law that is drawn into family law disputes. The scope of that enquiry is limited only by the extent of human endeavour.

Corporations

The FCFCoA (Div 1) and FCFCoA (Div 2) may make orders that affect companies, office holders in those companies and those that have ownership interests in them. For example:

(a) The court has jurisdiction to make *in personam* orders directed to parties who are directors or shareholders;

(b) The court has jurisdiction to deal with companies under the *Family Law Act* itself, for example under Part VIII AA, s 114 (Injunction) or s 106B (Transactions to defeat the jurisdiction of the court);

The FCFCoA (Div 1) has original jurisdiction under the Corporations Act. Part 9.6A of the Corporations Act confers original jurisdiction on the FCFCoA (Division 1) with respect to civil matters arising under that Act. Moreover the court may be able to draw on accrued jurisdiction to deal with corporations as part of dealing with the entirety of a dispute which is otherwise uncontroversially before the court.

Thus, in the context of a matrimonial dispute, the FCFCoA (Div 1) has jurisdiction, for example:

(a) To resolve shareholder disputes under s 234 of the Corporations Act, potentially resulting in remedies such as winding up the company, compulsory purchase of shares, appointing receiver or manager, requiring a director to do an act or thing, etc.;

(b) To deal with statutory notices for demand of payments pursuant to s 459E of the *Corporations Act*;

(c) To order the winding up of a corporation;

(d) To deal with insolvent transactions under s 588FC and voidable transactions under s 588FE;

(e) To deal with directors in relation to breaches of fiduciary duty (s 1318 of the *Corporations Act*) or any of the breaches of any of the other obligations imposed upon directors under the *Corporations Act*.

When applications come before the FCFCoA (Div 1) including applications for relief under the Corporations Act, the aspect of the application that relates to the Corporations Act is intended to be heard in the same manner as such an application would be heard in any other jurisdiction exercising jurisdiction under the Corporations Act.

Trusts

It should hopefully not be surprising that matrimonial disputes often include having to address a family trust. In circumstances where the trust is the subject of a deed, then the treatment of that trust is, by and large, consistent with the treatment of a trust in any other jurisdiction.

The exception to that is where the trust has been used as a *"alter ego"* of one or both of the parties and in which case the court may make *in personam* orders addressed to the parties if necessary, for example, to reverse transactions that would otherwise have defeated the jurisdiction of the court.

Otherwise, the court has to have regard to the terms of the trust as set out in the deed including the powers of the appointor, the role and responsibility of the trustees and the rights of the beneficiaries. The position was explained by the High Court of Australia in *Kennon & Spry* (2008) CLR 366.

There can of course be tax or other revenue consequences of various transactions involving trusts including transactions which are carried out pursuant to court orders. These are areas in which people with experience in that area of law have much to offer to the family law jurisdiction.

It is not uncommon in property proceedings to hear allegations that property is held on behalf of someone other than the legal owner. There are applications made in the court for declarations that property is held pursuant to trust such as a constructive trust or resulting trust. The jurisdiction to deal with those allegations usually flows from the accrued jurisdictions of the courts to deal with the entirety of a dispute before it.

In those cases where the court accepts that it has jurisdiction to deal with an allegation of a trust, those matters are generally managed in a way which would approximate the way in which they are dealt with in other jurisdictions. That is to say the allegation is usually required to be pleaded. Sometimes the court will order a statement of facts, issues and contentions, the intention being that the basis on which it is alleged that a trust exists is set out in a way which is clear and unambiguous to the person responding to the allegation.

Bankruptcy

If a party is declared bankrupt, the property of that party obviously vests in their trustee in bankruptcy.

The relief that can be sought under the Bankruptcy Act includes for example the right to have a sequestration order set aside if, for example, the sequestration order ought not to have been made: s 153B of the Bankruptcy Act.

A trustee may be joined to family law proceedings and may seek, for example, relief by way of relation back of property disposed of pursuant to the Bankruptcy Act. The trustee may elect to be joined to the proceedings to pursue a claim against the non-bankrupt party of the proceedings. A trustee can elect to continue an application commenced by the bankrupt pursuant to s 60(2) of the Bankruptcy Act.

For a recent example of the FCFCoA (Div 1) dealing with an application to set aside a s 139ZQ notice in the context of matrimonial proceedings see *Lahiri & Saha* [2022] FedCFamC1F 271 (appeal dismissed: *Saha & Lahiri (No 2)* [2022] FedCFamC1A 181).

Accrued Jurisdiction

A matter (as opposed to a cause of action) before the Court may very well encompass a dispute that is wider than the definition of a matrimonial cause. The resolution of that dispute may require determination of matters that are not the subject of federal law.

A succession of High Court authorities have established that the Family Court has jurisdiction to deal with the entirety of a matter that is before it where it is necessary to do so. A history of the development of accrued jurisdiction is set out in *Houghton v Arms* (2006) 225 CLR 553 at 564 [27]. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said:

> *The expression "accrued jurisdiction" appears in authorities including Fencott v Muller … and Australian Securities and Investments Commission v Edensor Nominees Pty Ltd ... In Edensor, the Court saw no harm in the continued use of the term "accrued jurisdiction" provided it be borne in mind that, whilst there might be several claims made in litigation, there was but one "matter", and that jurisdiction conferred with respect to that matter is not "discretionary" and ordinarily is to be exercised by the court concerned.*

Brereton J, in *Valceski v Valceski* (2007) 70 NSWLR 36 at 48-57 also sets out in some detail the history of accrued jurisdiction in family law. In *Warby v Warby* (2001) 28 Fam LR 443, particularly at 476-477, the Full Court of the Family Court recognised unequivocally the existence of accrued jurisdiction.

Additionally, both the FCFCoA (Div 1) and the FCFCoA (Div 2) have associated jurisdiction: s 29 of the FCFCoA Act in the case of the FCFCoA (Div 1) and s 134 in the case of the FCFCoA (Div 2).

CONCLUSION

Family law is a specialist jurisdiction that by necessity often involves resolution of matters that extend beyond the usual concept of matrimonial causes.

Practitioners should not be deterred by the discretion that informs the outcome of a great many matters. Rather, they should be attracted by breadth of the reach of the jurisdiction.

There is ample opportunity for those who have experience in other areas of law to bring that experience to the family law jurisdiction. Doing so will no doubt prove rewarding to the practitioner, and likely also be welcomed by the Court itself.